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No. 87-346

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CARLOS FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his right to be present during one day of trial testimony and, if he did not, whether the district court's decision to continue the trial during petitioner's brief absence constituted harmless error in the circumstances of this case.

2. Whether a law enforcement officer who participated in the investigation that culminated in the charges against petitioner was properly allowed to testify as an expert witness with respect to the meaning of certain code terms used in intercepted telephone conversations.

3. Whether the district court committed plain error in deciding how to explain to the jury the absences of the six co-defendants who pleaded guilty during the trial.

4. Whether conspiracy to engage in a narcotics offense, in violation of 21 U.S.C. 846 or 963, may serve as one of the predicate offenses for the charge of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 822 F.2d 382.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14) was entered on June 30, 1987. The petition for a writ of certiorari was filed on August 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; conspiring to import cocaine, in violation of 21 U.S.C. 963; engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848; and five counts of using a telephone

to facilitate the cocaine distribution conspiracy, in violation of 21 U.S.C. 843(b). He was sentenced to 40 years' imprisonment and was fined $200,000.[1]

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner headed a large organization devoted to importing cocaine into the United States from Colombia and distributing it in New York, New Jersey, California, and elsewhere. The organization operated between November 1977 and March 1985 and was centered in Elizabeth, New Jersey; Miami, Florida; and New York City. In the course of the conspiracy, petitioner directed the movement of cash from New Jersey to Florida and Colombia, and the delivery of cocaine from Colombia to Florida and from there to New Jersey, New York, and elsewhere.

Petitioner directed his associates to transport cash—usually in excess of $100,000 at a time—on a monthly basis from New York and New Jersey to Miami. Petitioner used the cash to purchase cocaine, which he stored in various apartments and houses in Miami before transporting it to sales points in the northern and western United States. Tr. 686-688, 731-756, 765-766, 770-771, 820-821, 4639-4643. Petitioner also arranged for cocaine to be smuggled into Florida aboard Colombian merchant ships. One such importation took place in October or November 1979 and resulted in the delivery of approx-

[1] Five additional counts of using the telephone to further the cocaine distribution conspiracy were dismissed during trial. One of petitioner's co-defendants, David Barco, was convicted on the two conspiracy counts, the continuing criminal enterprise count, and two telephone counts. His conviction was affirmed by the court of appeals in a judgment order. *United States* v. *Barco*, No. 86-5135 (3d Cir. June 30, 1987), cert. denied, No. 87-5368 (Oct. 5, 1987). Six co-defendants—Francia Rivera, Nelson Lasso, Ada Valdez, Antonio Borja, Rueben Concha, and Alberto Marin—entered guilty pleas to various charges during the course of the trial.

imately ten kilograms of cocaine to petitioner's employees. Tr. 781-789, 2688-2692, 2304-2307. The following summer, petitioner and his associates took delivery of 15 kilograms of cocaine that had been smuggled into Miami aboard a Colombian vessel. Tr. 795-796, 799-804, 2777-2780.

Once the cocaine was transported to New Jersey and New York City, it was "cut" with a mixture of mannitol and then distributed by petitioner's employees to various customers. The cash payments for the cocaine were stored at the home of petitioner's aunt in Elizabeth, New Jersey. Tr. 615-618, 620-622, 743-744, 1115-1119. In the fall of 1982, petitioner extended his operations to California. Employees drove to Los Angeles and San Francisco in cars containing cocaine hidden in secret compartments. After delivering the cocaine, the drivers returned to Florida. Tr. 3636-3662, 3759-3760, 3890-3891.

In 1983 and 1984, petitioner's organization experienced several setbacks. Two shipments of cocaine were seized by law enforcement authorities; in one instance, two valuable employees of the organization were arrested in New Mexico while transporting 20 kilograms of cocaine to San Diego, California. Those individuals were prosecuted and convicted. Tr. 3562-3563, 3774-3785, 4236-4237, 4506-4511, 4513. In late 1984, DEA agents arrested three men associated with petitioner's organization who had retrieved four kilograms of cocaine from an airplane that had arrived from Colombia. Tr. 5170-5172, 5178-5185. In November 1984, federal and state authorities obtained wiretap orders for several telephones used by members of petitioner's organization. The resulting intercepted conversations led to the indictment of petitioner and his co-defendants in March 1985. Tr. 5356-5382.

2. The court of appeals affirmed petitioner's convictions (Pet. App. 1-13). The district court had instructed the jury that the distribution conspiracy charge and the

importation conspiracy charge could serve as predicate felony violations for petitioner's conviction on the continuing criminal enterprise (CCE) count. Tr. 7402-7405. The court of appeals rejected petitioner's argument that a conspiracy charge may not serve as the predicate for a CCE conviction. The court of appeals stated that "[t]he statute provides, in clear language, that *any* felony violation of Subchapters I and II of Chapter 13 of Title 21 is an eligible predicate. There is no exclusionary or delimiting language as to § 846, § 963, or to any other felony" (Pet. App. 5-6 (emphasis in original)). The court found the purpose of the statute provided additional support for the interpretation dictated by the statute's plain language (*id.* at 6-8).[2]

ARGUMENT

1. Petitioner contends (Pet. 14-17) that the district court's decision to allow the trial to proceed for one day in his absence violated his right to be present at trial. On November 15, 1985, the 32d day of trial, petitioner became ill during the lunch hour. The trial court ordered an adjournment of the trial and directed that petitioner be examined by a doctor. Tr. 5015-5021. On the next trial day, November 18, petitioner did not appear in court

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[2] The court of appeals also found no merit to petitioner's claims that he was denied his right to confront adverse witnesses, that the district court had failed to instruct the jury properly regarding the absence of co-defendants who pled guilty, and that various evidentiary rulings were incorrect (Pet. App. 2 n.1). The court also rejected petitioner's other attacks on his CCE conviction, including his claim that the statute's requirement of a continuing series of violations requires more than a verbal agreement, that the offense of using a telephone to facilitate a drug distribution conspiracy (21 U.S.C. 843(b)) cannot be used to prove the series of violations required under Section 848, and that the evidence was insufficient to show that petitioner committed the Section 843(b) offenses. Pet. App. 8-12.

because of his illness. One of petitioner's attorneys advised the district court that petitioner waived his right to be present because he took the position that the witnesses scheduled to testify would not implicate him (Tr. 5034-5035).

Petitioner returned to court the next day, November 19, although he remained ill. Petitioner expressed a willingness to leave the courtroom on the same basis as the previous day. When the district court indicated that it might hear the cross-examination of New Jersey detective John Guslavage, however, petitioner decided to remain in the courtroom. Tr. 5228-5230, 5237.[3] During the course of the day, while another witness was testifying, petitioner became ill and left the courtroom (Tr. 5255-5256). The district court asked petitioner's attorney whether petitioner was "willing that we proceed in his absence." The attorney responded that "with this technician [witness Roger Godino] we have no problem. We have no questions for him anyway. So we can go ahead with this particular witness." Tr. 5255. After Godino concluded his testimony, the following exchange took place between petitioner's counsel and the district court (Tr. 5265-5266):

COUNSEL: Your Honor, one last thing. Mr. Fernandez is still not feeling well. He would like to go back to MCC [Metropolitan Correctional Center].

THE COURT: Back to MCC and allow us to proceed?

COUNSEL: Yes sir.

THE COURT: Let's see if arrangements can be made. I understand that an attempt has been made to get him some soup and crackers and why doesn't he try

[3] The cross-examination of Guslavage had been interrupted when petitioner became ill on November 15. See Tr. 5019-5021.

that and then do whatever he wants to do.

COUNSEL: He doesn't want to eat anything. If he eats that he may have the runs again [*sic*]. So he would rather skip that and just go back.

THE COURT: All right. Let's recess. Fine.

During the remainder of petitioner's absence, a Drug Enforcement Administration (DEA) agent testified about the seizure of gem stones, jewelry, and cash from a safe deposit box in a Miami bank (Tr. 5267-5271).

The courts below properly rejected petitioner's contention that the district court's decision to continue the trial violated petitioner's right to confront the DEA agent. On November 18 and 19 petitioner, through his attorney, informed the district court that he did not object if the trial proceeded in his absence because the witnesses scheduled to be examined were not in his view important adverse witnesses. When he had a contrary view of the importance of the scheduled testimony – in the instance of the cross-examination of Detective Guslavage – petitioner made clear his concern about the continuation of the trial in his absence.[4] Because petitioner adopted the practice of objecting to continuation of the trial when he wanted to assert his right to be present, the district court was entitled to interpret petitioner's failure to object as a waiver of his right to be present at trial. *United States* v. *Gagnon*, 470 U.S. 522, 527-529 (1985); *United States* v. *Gallo*, 763 F.2d 1504, 1529 (6th Cir. 1985), cert. denied, 474 U.S. 1068 (1986); *United States* v *Brown*, 571 F.2d 980, 987 (6th Cir. 1978); see also *Taylor* v. *United States*, 414 U.S. 17 (1973).

Moreover, even if the district court erred by proceeding in petitioner's absence, any such error is subject to harm-

[4] Petitioner was present in the courtroom when the cross-examination of Detective Guslavage was resumed. See Tr. 5399-5444.

less error analysis. *Delaware* v. *Van Arsdall,* No. 84-1279 (Apr. 7, 1986), slip op. 8-11; *Rushen* v. *Spain,* 464 U.S. 114, 117-118 n.2 (1983) (per curiam). Petitioner argues (Pet. 16-17) that the officer's testimony about the contents of petitioner's safe deposit box established an essential element of the continuing criminal enterprise charge—whether the enterprise had obtained "substantial income" (21 U.S.C. 848(b)(2)(B)). But the contents of the safe deposit box were of little consequence in the trial. The district court, in fact, refused to allow a jeweler to testify about the value of the gems found in the safe deposit box largely because the proffered testimony was inconsequential when compared with the $6,000,000 in cocaine that was present in the courtroom. Tr. 5304-5305. Moreover, petitioner never asserted below that he had information that could have resulted in a more effective cross-examination if he had been present. Nor did petitioner's lawyer request that the officer be recalled on a day when petitioner would be present. In these circumstances, the district court's decision to proceed with the agent's testimony was, at most, harmless error. Cf. *United States* v. *Toliver,* 541 F.2d 958, 965 (2d Cir. 1976).

2. Petitioner also claims (Pet. 17-19) that the district court erred by permitting New Jersey State Police Officer Victor Irizarry to testify as an expert witness regarding the meaning of certain code words that were used in several recorded telephone conversations introduced at trial. The court concluded that the process of understanding intercepted telephone conversations concerning drug transactions "is more than just hearing and being able to understand the literal meaning of the word. You have to have a background in prices of drugs, the method of dealing in drugs, in order to see the significance of words which are code words" (Tr. 5325-5326).[5] During the course

[5] Officer Irizarry plainly qualified as an expert in this area. He had participated in more than 100 wiretap investigations of drug cases and

of his testimony, Irizarry defined code words that were used in eight of the intercepted telephone calls. Tr. 5350, 5356-5385.

A district court's determination to admit expert testimony should stand unless that determination is manifestly erroneous. *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962). The operations of drug dealers are a proper subject for expert testimony. *United States* v. *Ginsberg*, 758 F.2d 823, 830 (2d Cir. 1985). And the use of expert testimony on code words in narcotics transactions has long been deemed proper. *United States* v. *Borrone-Iglar*, 468 F.2d 419, 421 & n.4 (2d Cir. 1972), cert. denied, 410 U.S. 927 (1973); see also *United States* v. *Brown*, 776 F.2d 397, 399-402 (2d Cir. 1985) (opinion that defendant was a "steerer," a person who screens potential drug buyers), cert. denied, 475 U.S. 1141 (1986); *United States* v. *Young*, 745 F.2d 733 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985) (opinion that narcotics transaction occurred based upon observation of passing of paper bag). Accordingly, the district court did not err by admitting the expert testimony.[6]

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had served as a reviewer in more than 20 cases. That position involves interpreting intercepted calls and planning strategy for further investigation. Irizarry also was experienced with the use of code words in narcotics transactions through his review of intercepted conversations and his participation in undercover investigations. Tr. 5343-5349.

[6] The cases cited by petitioner do not support his argument; in each case the court admitted the expert testimony. See, *e.g.*, *United States* v. *Nersesian*, 824 F.2d 1294, 1307-1309 (2d Cir. 1987) (approving admission of expert testimony by officer who participated in investigation of defendant).

Contrary to petitioner's claim (Pet. 19-20), the district court's determination that Irizarry's testimony was admissible under Rule 403 of the Federal Rules of Evidence does not warrant further review. The court properly instructed the jury that it was responsible for determining how much weight to assign to Irizarry's testimony. See Tr. 7391.

3. Petitioner next argues (Pet. 20-23) that the district court erred because it failed to warn the jury against drawing any adverse inferences from the midtrial guilty pleas entered by petitioner's co-defendants. On the 19th day of trial, the district judge told the jury that the court would deal with three co-defendants in "separate proceedings" (Tr. 2656). In fact, those individuals had pleaded guilty. None of the remaining defendants requested a further jury instruction regarding the absence of the three defendants who had pleaded guilty. *Ibid.* The next day, a fourth defendant pleaded guilty. When the prosecutor pointed out that the court had said nothing about the defendant's absence to the jury, the court said it preferred to defer an explanation unless defense counsel requested otherwise. No defense lawyer made such a request; instead, two lawyers requested that the court remain silent. Tr. 2770-2771.

Two days later, after a fifth co-defendant pleaded guilty, petitioner's attorney asked the district court to advise the jury about the absence of the last two co-defendants in the same way that the court had dealt with the absence of the first three. The district court then told the jury that he had "severed the proceedings" against the two defendants. Once again, no defendant objected to the procedure employed by the district court. Tr. 3063, 3099.

Five trial days later, one of the remaining defendants—Antonio Borja—pleaded guilty, leaving only petitioner and co-defendant Barco as defendants in the case. When Barco's lawyer pointed to Borja's absence, the district court suggested that they proceed with the trial. Barco's attorney interjected that they should go ahead "without saying anything." Neither petitioner nor Barco requested any jury instruction regarding Borja's absence. Tr. 4122, 7156-7158. The district court later told the jury not to speculate on the reasons for the absence of the other

co-defendants (Tr. 7392), again without objection from defense counsel.

In view of his failure to object to the district court's action, petitioner's claim must be measured against the plain error standard (see Fed. R. Crim. P. 52(b)). The question whether the failure to give additional instructions was plain error does not warrant further review by this Court. As several courts have held, the type of statement made by the district court, when coupled with instructions on the presumption of innocence, burden of proof, and the requirement to decide the case solely on the evidence against each defendant,[7] are sufficient to overcome any claim of plain error. *E.g., United States* v. *Barrientos,* 758 F.2d 1152, 1157-1158 (7th Cir. 1985), cert. denied, 474 U.S. 1062 (1986); *United States* v. *De Lucca,* 630 F.2d 294, 299-300 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981); *United States* v. *Beasley,* 519 F.2d 233, 239-241 (5th Cir. 1973), vacated on other gounds, 425 U.S. 956 (1976).

4. Petitioner argues (Pet. 23-25) that drug conspiracy charges under 21 U.S.C. 846 and 963 may not serve as the predicate offenses necessary to establish a charge of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

The language of Section 848(b)(1) unambiguously states that a violation of "any provision of [either subchapter I or II of Chapter 13 of Title 21] the punishment for which is a felony" constitutes a permissible predicate offense. Since the statutory provisions proscribing drug conspiracies (21 U.S.C. 846 and 963) are contained in the relevant portion of Title 21, a violation of either of those provisions may serve as a predicate offense. Petitioner has pointed to nothing in the legislative history of the CCE provision indicating that Congress intended to forbid the use of a drug

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[7] Those instructions were given in this case (Tr. 7391-7392).

conspiracy charge as a predicate offense for a CCE conviction. See H.R. Rep. 91-1444, 91st Cong., 2d Sess. Pt. 1, at 50 (1970); see also *Garrett* v. *United States*, 471 U.S. 773, 785 (1984) ("[i]t runs counter to common sense to infer * * * that Congress intended to substitute the CCE offense for the underlying predicate offenses in the case of a big-time drug dealer rather than to permit prosecution for CCE in addition to prosecution for the predicate offenses. * * * [I]t would be illogical for Congress to intend that a choice be made between the predicate offenses and the CCE offense in pursuing major drug dealers").

The courts of appeals have uniformly concluded that conspiracy offenses may serve as predicate offenses for purposes of a CCE charge. See *United States* v. *Ricks*, 802 F.2d 731, 737 (4th Cir. 1986)(en banc), cert. denied, No. 86-759 (Dec. 6, 1986); *United States* v. *Grayson*, 795 F.2d 278, 285-286 (3d Cir. 1986), cert. denied, No. 86-6163 (Apr. 20, 1987); *United States* v. *Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986), cert. denied, No. 86-5872 (Mar. 9, 1987); *United States* v. *Schuster*, 769 F.2d 337, 345 (6th Cir. 1985), cert. denied, No. 85-5760 (Feb. 24, 1986); *United States* v. *Young*, 745 F.2d 733, 748-752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Brantley*, 733 F.2d 1429, 1436 n.14 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Middleton*, 673 F.2d 31, 33 & n.2 (1st Cir. 1982). In the absence of a conflict among the circuits on the issue, there is no reason for this Court to grant review.[8]

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[8] In *Jeffers* v. *United States* 432 U.S. 137 (1977), a plurality of this Court found that a defendant in some circumstances may not receive cumulative punishment for a CCE conviction and a drug conspiracy conviction. Petitioner does not argue that the result in *Jeffers* bars the use of a conspiracy charge as a predicate offense. The conspiracy charge in *Jeffers* itself did not serve as a predicate for the CCE conviction (see 432 U.S. at 141, 142-143 (plurality opinion)). Indeed, even if CCE and conspiracy charges cannot be brought in separate proceedings and are not subject to cumulative sentences, that fact would not mean that Congress intended to exempt a drug trafficker from

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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liability for CCE simply because one of the offenses involved in the series of three violations that he committed was a conspiracy. See *United States* v. *Young*, 745 F.2d at 750-751.

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